Articles

A Government *For* the People

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ABRAHAM LINCOLN CONCEIVED ours as "government of the people, by the people, for the people,"[1] when he coined the epigram now emblematic of the best aspirations of American democracy. Two legs of Lincoln's triad have received a good deal of scholarly and popular attention. Twentieth-century constitutional theory produced much work addressed, at least implicitly, to what it means to be a government "of" the people and "by" the people. The idea of government "of" the people underlies scholarship addressing the accountability of government actors, the expansion of the franchise, and the promotion of public deliberation. This work recognizes a need for the people to have some meaningful ownership of their government. Even more voluminous is the literature devoted to the idea of government "by" the people, including theories of participation, majoritarianism, representation, civic republicanism, public choice, and even campaign finance. All of these areas of inquiry touch to some degree on what it means for the people to be the instrument of their own government.

Christopher L. Eisgruber's bold new book, *Constitutional Self-Government*,[2] falls among a much smaller group making a serious effort to explore what it would mean for a government to be "for" the people as well. The book, couched in terms that cast their focus primarily on judges, is, at its core, about a matter much deeper than judicial review, and fundamental to a democracy. The book forces the reader to consider what it actually means for the people *as a whole* to govern themselves. Fundamental as it is, this central question has been largely

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1. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).
2. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001).

skirted or even ignored by many constitutional theorists. Eisgruber, however, reaches beyond the simple platitudes, like "majority rule" or "judges should not make law," which cling to our public debate like so many barnacles—hard to remove, sharp-edged, and contributing little—and suggests an answer arising from a new way to understand the institution of judicial review.

Not since John Hart Ely's *Democracy and Distrust*[3] has a book on constitutional theory sought so valiantly to situate judicial review organically within a robust and thriving vision of democracy. Eisgruber's book shares some similarities with that earlier icon of constitutional theory. Physically, the books bear a family resemblance: same press, same size, same format, nearly the same length. They both have just six chapters, the first of which is devoted to demonstrating the bankruptcy of the originalist perspective on the Constitution, and describing the impoverished understanding of the role of the courts in American democracy to which it invariably leads. Both move on from there to a more affirmative explication of the role of courts in a democracy. Both books are written fluidly and straightforwardly, using refreshingly simple prose.

But there are important differences, as well.[4] Ely's goal was to "fill in" the Constitution's open texture and offer judges a relatively simple way to resolve a whole range of constitutional claims. Eisgruber, in contrast, believes (in true democratic spirit) that the Constitution's open texture cannot be filled in with any systematic approach that aspires to offer prescriptive solutions. If the Constitution is to be the dynamic facilitator of self-government that Eisgruber envisions, then only individual judgments about specific situations can serve to resolve the many issues that arise under the document's more abstract provisions. And therein lies the real difference between Ely and Eisgruber: Ely's is a parsimonious model of judicial review that limits the courts to a role of policing the representative process, betraying an underlying discomfort with the institution of judging and, accordingly, seeking to defend judicial review only as a means to lubricate the machinery of a government largely *by* the people. Eisgruber, on the other hand, celebrates the judgment vested by the Constitution in the courts as a salutary element of American democracy, allowing the

3. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

4. Indeed, Eisgruber goes so far as to point out their difference, suggesting by his disavowal, perhaps, that he may sense the tempting comparison. *See* EISGRUBER, *supra* note 2, at 5–6.

judiciary an instrumental role in ensuring a government *for* the people.

If one reads this book quickly or uncharitably, one might come away with a general sense that the author simply defends judicial review and places the task of interpreting important moral issues in the courts. This does not sound new, nor does it seem to carry much to persuade anyone who did not start out already sympathetic to judicial review. To such a critic, perhaps, confronted with another defense of judicial review, they all "look alike."[5] If this conclusion is all one takes away from the book, however, one has missed a great deal of what it has to offer. There is much that is new, much that is persuasive, and much that should give pause to anyone, sympathetic to judicial review or not, who has yet to grapple with the fundamental questions of democratic theory that Eisgruber poses. Because I fear that these significant contributions are easy to miss, I seek in this responsive essay to highlight what I see as the important impact of Eisgruber's theory.

In the end, the tenacious reader is rewarded, for Eisgruber offers us a radically new answer to Bickel[6]—an answer that deserves thoughtful attention. His answer urges us to understand judicial review not as "deviant" from the standpoint of democracy, but indeed as consistent, perhaps even necessary, to achieve democracy in its fullest sense of government of, by, and for all the people.

This essay proceeds in two parts. The first half presents my understanding of the major steps in Eisgruber's argument. In the effort to summarize a complex argument briefly, clearly and faithfully, I aspire to sketch a portrait of this rich book rather than a photograph, and inevitably I will fail to be entirely faithful to the author's own enterprise. But I hope Professor Eisgruber will find that the representation captures something of its spirit. The second half of this essay will be devoted to discussing both the most troubling aspect of Eisgruber's account, in my view, and its most valuable contribution to a better polity. Both center around his pervasive reliance on the concept of moral judgment.

5. Hence, perhaps, the relentless clumping of Eisgruber's theory with Dworkin's in Professor Hills's critique in this symposium, despite the important differences between the two. *See* Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?*, 37 U.S.F. L. REV. 37, 38, 45, 50, 51, 53, 57–59 (2002).

6. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 18 (2d ed. 1986) (arguing that the "root difficulty" is that judicial review is a deviant institution in the American democracy).

I. The Problem

The colossal theoretical problem posed by the very popular majoritarian approach to government—every school child senses the facial fairness of a "majority rule" system—is most often not acknowledged by the champions of majoritarianism. Yet the problem persists: Should 51% of the population be able to deal 100% of societal benefits to themselves 100% of the time, and impose 100% of the costs, preferences and moral values on the other 49%? And if not, why not? Even the school child with the innate sense of fairness also perceives that it is a small step from "majority rule" to "ganging up."

Those who can accept the majoritarian model indulge in a cognitive dissonance that allows them to believe that this is not a problem for democracy, but rather a necessary consequence of it. When "the people" speak through their (ostensibly) majoritarian institutions, those who suffer the burdens of that process have no grounds to complain. The hope is that shifting coalitions will ensure that individuals will not always be on the losing side. This may not be perfectly fair, but it is the only way democracies can resolve issues of public policy, they say. These defenders look to avenues of public discussion and debate, as well as opportunities for participation through free elections, as evidence that democracy—focusing on free access to its processes—is flourishing. But Eisgruber shows this to be a shallow conception of democracy, barely masking the ugly truth that controversial issues will have to be resolved somehow, and no amount of discourse or participation will alleviate the pain of losing such a policy dispute.

Some will take solace in the Constitution's protections against breakdowns in majoritarian decision-making, and indeed the idea of having a constitution is often defended on just such grounds. John Hart Ely thought there might be identifiable markers of a relatively rare situation in which majoritarian institutions misuse the power accorded to them by a majority-rule system, and that courts could be taught to watch for those markers and intervene to invalidate any resulting legislation. This approach would preserve majority rule, but only in the sense that all could participate.[7] It would prevent the majority from silencing and disenfranchising the minority, but offers the minority no further consolation. Notice the implicit emphasis on participation—government *by* the people.

7. The indicia tend to focus on group characteristics of a burdened class that has suffered a history of prejudice, political powerlessness, and other forms of vulnerability to overt discrimination. *See* ELY, *supra* note 3, at 75–76 (discussing "suspect" characteristics that might signal need for judicial intervention).

Some reject even that retreat from majority rule. They insist that the terms of whatever constitutional protection is to be afforded the losers in a majority-rule system be determined solely by reference to choices and votes cast hundreds of years ago in the text of the Bill of Rights. This originalist orientation exacerbates the tension with democratic principle. In what sense are the people governing themselves if the controversial policies of the day are being determined by fractions of the population, whose only constraints are prescribed by fractions of earlier populations, now long dead?[8] Many have tried their hands at defending or refining such a system in the name of democracy, but all have failed.[9]

But Eisgruber says that "[d]emocracy is not the same thing as majoritarianism."[10] Indeed, majority rule—even without the aggravated problems added by superimposing an originalist interpretation of the Constitution—is downright *un*democratic. It is undemocratic because it responds only to the interests of some of the people, not all. Those who are left out are not really governing themselves. This proposition seems defensible even beyond the arguments that Eisgruber offers to support it. There is some support for this idea in scholarship that has pointed out that the Constitution simply cannot be squared with a commitment to majority rule.[11] In addition, Madison's *Federalist 10*[12] makes very clear that decision by electoral majorities is not necessarily the path to good government, nor is it the path that our Constitution, with its republican scheme of representation, establishes.

One who wishes to construct a more democratic way to resolve important societal disputes must confront an additional challenge, however. That challenge lies in identifying, supporting, defining, and implementing some sort of obligation in government to those who are not part of the majority (using the term "majority" here loosely to

8. *See* EISGRUBER, *supra* note 2, at 26–28 (discussing anti-democratic nature of the originalist approach to constitutional interpretation). This is reminiscent of the "inter-temporal difficulty" coined by Ackerman. *See* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1045–47 (1984).

9. *See, e.g.*, Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

10. EISGRUBER, *supra* note 2, at 18.

11. *See* Lawrence Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990) (demonstrating the Constitution's poor fit with a notion of popular sovereignty, if that latter notion is understood to mean majority rule); Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531, 552–55 (1998) (pointing out many ways in which majority rule cannot be said to square with constitutional aspirations).

12. THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., 1987) (pointing out dangers of faction, even when it constitutes a majority, if moved by interests adverse to the interests of all).

mean those whose votes have together produced the government and who generally support its policies). Where would such an obligation come from, and what would it oblige the government to do or refrain from doing? Perhaps more fundamentally, what is the "government" apart from the majority of the people such that it could shoulder obligations at all? This is the basic problem of self-government that Eisgruber sets out to resolve.

II. The Solution

It is the problem of understanding how government can stand apart from, yet take into account the interests of, all its citizens that leads Eisgruber to the principle of "impartiality," which forms a foundational building block for his argument. As he defines this term, it refers to an obligation on government to be responsive to the interests and needs of all the people.[13]

A. Derivation of a Principle of Impartiality

It is striking that Eisgruber does not point to the Constitution, or any part of it, to defend the existence of this principle of impartiality. I believe it could be defended as arising out of the Constitution's fundamental commitment to the equality (moral and political) of all persons. This thick conception of equality finds support in the text and in the structure, as well as in political theory and in the history of the Constitution.[14]

But Eisgruber would view that as backwards. Instead of beginning with the Constitution and seeking to understand what it tells us to do to accomplish its goals, Eisgruber begins his analysis with what he views as a prior national commitment: the commitment to democracy or, a concept that he uses interchangeably, popular sovereignty.[15] Democracy, properly understood, is a way of describing the prior state of the people before they constituted a nation through the adoption of a written constitution. Its core meaning is the entitlement of the people

13. *See* EISGRUBER, *supra* note 2, at 19.

14. *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. (forthcoming Dec. 2002) (making a related argument about the equality commitments of the Constitution giving rise to an entitlement in all persons for representation of a certain type in the political branches of government).

15. The work of Bruce Ackerman could be viewed as taking a somewhat similar posture toward the inter-relationship between the principle of popular sovereignty, embodied in the words "we the people," and the Constitution itself. *See, e.g.*, Bruce Ackerman, WE THE PEOPLE I: FOUNDATIONS 7 (1991) (suggesting there are overriding popular commitments that take priority over the strict terms of the Constitution itself).

to govern themselves, and one of the steps that the American people took in fulfillment of that entitlement was the act of adopting a constitution. Thus the document should be understood as a byproduct, rather than a progenitor, of self-government.

Understood this way, it is democracy that ultimately gives rise to constitutionalism, not the other way around. For Eisgruber, democracy, suitably understood, comes first, and this orientation ultimately will have consequences for the process of interpreting the Constitution. For example, the "open-textured" provisions that have provided such fodder for constitutional theorists of all stripes must, on this account, be read in such a way as to further the cause of self-government. This view, placing democracy conceptually prior to the Constitution, obviously resounds principally in theory, not history, and so I would not expect a historical foundation for this ambitious claim. But the book would have benefited, in my view, from a more thorough discussion of the derivation of this understanding of the American polity. I do not gather that Eisgruber would seek to ground his claim in either history or moral philosophy, but rather in a kind of practical view of who "we the people" should be understood to be. Because the primordial status of popular sovereignty is a rich idea that does a great deal of work in the argument to come, I would welcome elaboration.

B. Application of the Impartiality Principle

Eisgruber's syllogism proceeds as follows: Americans are committed to democracy and self-government. Democracy and self-government are not served by any structure that systematically privileges majorities, because such a privilege does not allow all the people a voice in governing themselves. Put a bit more forcefully, majority rule is undemocratic. Therefore, American government requires that majority rule be limited.

Enter constitutionalism. Eisgruber posits constitutionalism in general as a means to limit majority government in the service of democracy, and our Constitution in particular is best understood to serve that function.[16] Its super-majoritarian amendment procedures, for example, are consistent with a constitutional design to develop pragmatic devices for implementing democracy by limiting the power of majoritarian government. For this and other reasons, our Constitu-

16. *See* Eisgruber, *supra* note 2, at 20.

tion should be interpreted as a document committed to serving the cause of democracy.

Democracy requires impartiality. This notion of impartiality obliges a government to maintain some effective mechanism for responding to the interests of all persons.[17] Impartiality, Eisgruber argues, more faithfully serves democracy than does simple majoritarianism, because it more fully responds to the beliefs and values that the American people hold and more effectively achieves justice.[18]

Therefore, the Constitution requires impartiality. Because it is dedicated to the establishment and support of self-government, the Constitution must be understood to contain a promise that the government will adhere to the principle of impartiality, dictated ultimately by democracy itself. Impartiality, then, is the key to understanding how the Constitution enables the American people to govern themselves in a truly democratic spirit, avoiding the pitfalls of the simple majoritarian model.

C. Situating Responsibility for Impartiality

So far, we have said that on Eisgruber's account, the Constitution ought to be read to impose on the government an obligation to alleviate the undemocratic implications of pure majority rule—a means of taking into account the interests and views of all persons. The next question is where this obligation will be placed in order to permit the government to carry out the mission embodied in the impartiality principle. The structural provisions of the Constitution, with their numerous instances of tempering, buffering, and balancing of majority government, clearly contribute to this goal.[19] But in addition to these largely procedural checks, there must be a way for government to resolve controversial moral issues such that this important aspect of public policymaking does not fall victim to pure majority rule.[20] The question is what part of government should be delegated this task.

17. *See id.* at 19, 54.

18.' *See id.*

19. I am speaking, for example, of the separation of legislative power into two branches with differently constituted electorates, as well as the checks and balances between President and Congress.

20. Eisgruber asserts that the people themselves make a distinction between matters that involve pure preference or collective self-interest and those that implicate principle. It is not clear whether this is an empirical claim or some other type of claim. To be true to the people's own approach to moral issues, Eisgruber argues that a government also must identify and segregate out issues of principle to be handled differently in the decision-

Eisgruber approaches the question gently, asking not whether the judiciary would be the perfect, the best, or the only institution capable of implementing this aspect of government's obligation to the people,[21] but rather whether the judiciary is at least as good as any other actor in our government.[22] I take it that the question is asked this way to reflect the fact that we do have an Article III in place, with a history of judicial review of constitutional claims.[23]

Eisgruber suggests that certain institutional characteristics of courts make them an appropriate repository for the obligation to make sure that public policymaking comports with the values of the people as a whole. Among these are the constitutional procedures for nomination and confirmation of judges by the elected branches of government, combined with their insulation from electoral pressures once in office. Together these structural components ensure some sort of fidelity to mainstream American values at the front end and give the judges the freedom to administer those values impartially from then on. This combination of political influence and independence is unavailable in any other branch of our government.

Understanding the nature of impartiality is critical to any effort to evaluate whether Eisgruber is correct in concluding that the judiciary is institutionally suited to implement the principle. The usual understanding of "impartiality" might suggest, unhelpfully, something like the familiar judicial obligation to avoid conflict of interest and bias, or decision-making influenced illegitimately by self-interest, rather than law or policy. If one interpreted the concept of government impartiality this way, there would be little to distinguish courts from other potential decision-makers in the competition for a claim to impartiality; this type of impartiality is simply a standard ingredient of good government. Indeed, as a society we fully expect and require all our decision-makers (except voters) to avoid conflicts of interest, bias, and self-interest in their public acts. Professor Hills's account, I believe, has succumbed to the temptation to understand impartiality according to

making process. It is only the matters imbued with moral implications that require the salutary effect of impartiality rather than majority rule. A fuller account of the basis for the special judicial handling of moral questions would be very helpful here.

21. Indeed, he explicitly acknowledges that one could imagine a government that satisfies the demands of impartiality without judicial review as we know it.

22. *See* EISGRUBER, *supra* note 2, at 52–53.

23. To its credit, this book does not have the air of a thought experiment devoted solely to the ethereal issues surrounding the design of an ideal democratic society. Rather it is grounded very much in the society that we have and the government that we already know.

this ordinary usage rather than indulging the author his own definition of the term. As a result, his attacks on Eisgruber's arguments for the judiciary's having a superior likelihood of impartiality compare the respective government actors according to the likely purity of their motives in the casting of votes.[24] This attack, however, is not responsive to the complex idea that Eisgruber defends in his book. As I read Eisgruber's argument, impartiality is not just a prerequisite to *good* or *fair* decision-making, as it would be in the popular sense of the term. Rather, his form of impartiality is essential to *democratic* decision-making. But what does impartiality require a government to do and are courts well-suited for the task?

Eisgruber looks to impartiality to undergird a deep and broad obligation on the part of a democratic government to serve in a representative capacity on behalf of all the people. This includes an ability to speak even for a people that may be divided on issues of moral principle. And it even includes an obligation, I gather, to represent the people against themselves when issues of immediate popular interest deflect attention from the people's deeper commitments to more enduring beliefs such as justice.

Eisgruber's insistence on representation means that all of these aspects of a complex people must find a voice somewhere in the government structure. Some parts of government respond well to the obligation to represent the people on issues regarding preferences and collective self-interest. Local government serves this function in some respects, as does the elected legislature at state and national levels.[25] But a truly representative government, argues Eisgruber, must also recognize that these are not the only matters on which the American people need a voice. They also have commitments to moral principle which must be represented somewhere in government.[26] Democracy requires no less.

The question remains which branch of government is best suited to serve as the people's representative in the resolution of issues involving moral principle. Eisgruber emphasizes that the courts have some institutional advantages over other contenders. Among these advantages, in addition to the security that comes from some degree of political independence, is the obligation to provide written reasons to support the moral judgments that they are asked to make on behalf of the people that they represent. This aspect of judicial decision-making

24. *See* Hills, *supra* note 5, at 40–42.
25. *See* EISGRUBER, *supra* note 2, at 92–93.
26. *See id.* at 53.

responds particularly well to the people's own expectation that moral choices will be supported by moral reasons, and not resolved simply by reasons of political influence or sheer numbers. The judiciary's aptitude for the task of addressing issues of principle is reminiscent, in some respects, of the "sober second thought" idea that appears in Bickel's account of judicial review.[27] Like Eisgruber, Bickel saw in the institutional characteristics of courts an opportunity to stand back and take stock of the larger issues that may be implicated by particular government actions, especially when they affect individuals. It is Eisgruber who makes the sober second thought a prerequisite to self-government.

There will no doubt be critics who will bristle at any suggestion that a court may be better at resolving issues of principle than either voters themselves or their elected representatives. They will rush to cite literature on actual voter behavior showing how seriously the people take the job of public policymaking, and to offer examples in which the public took issues of principle seriously, and then insist that they have destroyed Eisgruber's case for judicial review. But there is fallacy in this response.

I do not understand Eisgruber to be suggesting in any sense that the people or their elected representatives are unprincipled. Quite the opposite, his case for judicial review rests in part on a claim that the people hold a commitment to maintaining a national fidelity to certain moral principles, and that that commitment needs expression in government. Eisgruber does not suggest that the courts are the only institution that could be selected to carry out this representative function. Rather, he seeks to show that there is no need to fear that, by allocating this aspect of impartial rule to the judiciary, we have sacrificed any of the vigor of democratic self-government.

Again, a comparison to Bickel comes to mind. Bickel resolved what he called "the Lincolnian tension" between expediency and principle by placing responsibility for the latter with the courts, precisely because of the same institutional characteristics to which Eisgruber also points.[28] The difference between Eisgruber and Bickel is in how they proceed from the common recognition of the institutional characteristics supporting that division of labor. Bickel—who thought courts strained in tension with self-government—would have courts do as little as possible in the realm of principle, while Eisgruber—who

27. *See* BICKEL, *supra* note 6, at 26. The term was coined by Justice Stone. *See* Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

28. *See* BICKEL, *supra* note 6, at 65.

sees this tension as overstated—would rely on them to give voice to the people's belief in justice in a more fulsome version of government by and for themselves.

D. Guiding the Judiciary in Implementing the Impartiality Principle

Assigning the judiciary the task of overseeing society's commitment to principle is not new, and should not be especially controversial. Eisgruber's instructions to the judiciary on how to carry out this task, however, are not so familiar. His novel approach asks courts to look, not to their own personal belief systems or to those of the founders or the great political and moral philosophers, but to those of the American people. Emphasizing consistently the democratic pedigree of the courts and their representative status, Eisgruber asks them to undertake to resolve constitutional questions based on what they determine to be the way that the people (heterogeneous though we may be) view justice. The objective then becomes the ambitious project of constructing the American people's conception of justice.[29]

This democratization of principle could, perhaps, be faulted for giving too much to the people. It would be a sad irony if Eisgruber's arduous effort to avoid the vices of majoritarianism ended up with a standard that rested on what most people think justice requires. But I believe that Eisgruber fends off that criticism quite well by emphasizing that ultimately it will be the judge's task to make the determination according to a wide variety of factors, some determined by consensus or other indicia of popular sentiment, and others influenced by more tempered indications of national values over time, such as history and tradition—all of which pass through the filter of judgment.

Eisgruber's theory has more than this. He embellishes this basic account by suggesting there are certain types of moral questions ("discrete" and "comprehensive") that courts are institutionally better suited and less well suited to resolve, respectively. But essentially, I have described the guidance that courts are given in the book as to how to implement the important task that Eisgruber gives to them. I will devote the remainder of this essay to exploring in more detail what kinds of moral questions the courts should answer and posing for Professor Eisgruber some questions caused by an ambiguity in the understanding of the notion of moral judgment itself.

29. *See* EISGRUBER, *supra* note 2, at 126.

III. The Two Faces of Moral Judgment

The heart of Eisgruber's claim is the proposition that the Supreme Court should speak on behalf of the American people on matters of moral principle. I would put it somewhat differently: The Supreme Court should speak on behalf of the American people on matters that implicate the relationship of government to the individual in a free society. While this latter question may itself be literally characterized as a "moral" question in the broad sense of the word, this use of the concept of morality invites conflation of two very different types of questions that the American people, through some institutional vehicle, must answer. In contrast to Eisgruber's focus on "moral questions," in my view, the courts may be more profitably considered to be engaged in political judgment.

The importance of the distinction between Eisgruber's "moral question" and my "political judgment" can be illustrated by considering an example from one of the moral controversies of the day in our society. Suppose a community wishes to criminalize same-sex activity, for example, because a majority of the people in that community believe, according to their own moral schema, that such sexual behavior is immoral. Responding to that majority sentiment from its constituents, the local legislature outlaws the behavior. Is the legislature acting morally? Immorally? Who would answer such a question? One could say that the legislature is acting according to its highest moral principle, the faithful representation of its constituents' passionately held views. Or one could say that the legislature is acting immorally by restricting such an important aspect of an individual's opportunity to shape a meaningful life. Or one could say that morality is simply elusive at this level of decision-making. In order to be considered coherently, the act of the legislature must be broken down into two component acts, one of which is explicit and the other of which is implicit.

The explicit act is that the legislature has, in its representative capacity, accurately expressed the community's view that certain behavior is not morally supportable. I will call this the First-Order Question—in my example, whether the commission of sexual acts by members of the same sex is immoral. That question quite clearly presents itself as a moral issue. In the hypothetical, the moral issue was resolved by the legislature on moral grounds through law. One could hardly blame the legislators under these circumstances, if they went on the local television news after the vote and sought to take credit for

standing up for the moral views of the community by passing this law. That is exactly what they have done in the example.

But this hypothetical law simultaneously constitutes a second public act. This local criminal law also carries with it the unstated expression that "it is appropriate for this community to restrict the sexual activity that it finds morally offensive through criminal sanction." I call this the Second-Order Question—whether the community is correct to conclude, even implicitly, that it may create and enforce a law of this kind consistent with the principles of American democracy. Although one could consider this a moral question as well (as I gather Eisgruber would do), it implicates an entirely different set of moral criteria from those involved in the First-Order Question. For this reason, it might profitably be given a distinctive name, such as a political judgment. Moreover, institutional aptitude to resolve one type of moral question may not necessarily correlate to the same aptitude to resolve another.

When a person aggrieved by such a law challenges it in the federal courts according to constitutional practice, the "moral" issue that gave rise to the law (the First-Order Question) almost literally disappears and in its place arises a very different issue. The issue is not whether the particular sexual activity at issue is, in fact, moral or immoral, and thus whether the legislating community is right or wrong on its moral judgment—according to personal values, national consensus, or any other measure. It is difficult for me to imagine a tribunal to which I would entrust that role. I am concerned that Eisgruber's book could be read to say that he envisions the courts as that tribunal.

But I am sure that Eisgruber would agree that the altogether new issue presented by the hypothetical case is whether the Constitution permits a legislature to restrict the private sexual activity of consenting adults in this particular manner. That—a form of the Second-Order Question—is the question, and the only question, that the Supreme Court is actually called upon to answer. Eisgruber clearly thinks of this as a "moral" question as well. But I would hope it could it be meaningfully distinguished. The conflation of the First- and Second-Order Questions detracts dangerously from the argument for acceptance of judicial decision-making as a part of the democratic process.

If the Court were to be set up as an arbiter of moral correctness for all the people, it would invite the kind of response that Professor Hills provided, in which he argues that the people (the voters or the legislatures) are better able to answer their own moral questions than

is the Court. If the question is of the First-Order variety, then I would agree with Professor Hills and Justice Scalia in *Cruzan v. Director, Missouri Department of Health*,[30] that "nine people picked at random from the Kansas City telephone directory" could decide as well as the Court the question of whether some human behavior is or is not moral.[31] This is because the institutional characteristics that Eisgruber emphasizes as the foundation for the democratic pedigree and fitness of the Court to resolve moral issues do not render them fit to resolve the First-Order Questions such as whether same-sex sodomy is moral behavior or not. That is exactly the question we do *not* want the Court to decide, it seems to me.

For example, Eisgruber emphasizes the political aspects of the nomination and confirmation process that have demonstrably affected the composition and perspective of the courts. This connection to accountable government is offered as a reason for us to trust the judiciary to be tethered somewhat to mainstream values and to be competent to do the job of interpreting the Constitution according to what it determines to be the principles of the American people. If the courts are asking only First-Order moral questions, however, just as the community and its legislature ask those questions, then the political influence on judges becomes disabling rather than salutary. Judges whose personal moral views on social issues are consistent with the mainstream of American society cannot provide the independent, longer view that Eisgruber's impartiality theory demands. We would have no reason to trust that the judges supply any sort of independent force to ensure impartiality and temper majority rule that Eisgruber rightly insists upon in a democracy.[32] Thus we would have the worst of all worlds—majoritarian values that are imposed judicially rather than legislatively.

The Supreme Court came dangerously close to this approach in *Bowers v. Hardwick*.[33] In that case, the Court contributed to a conflation of First- and Second-Order moral questions by suggesting that a "moral" basis for legislation is sufficient to supply the minimum rationality required of laws in our democracy. Moreover, the Court came as close as possible to placing the courts at the top of a moral pyramid, when Justice White, writing for the majority, articulated soci-

30. 497 U.S. 261, 293 (1990).

31. *Id.* at 293 (Scalia, J., concurring).

32. *See* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1990–94 (1990) (arguing that the Supreme Court is not counter-majoritarian enough).

33. 478 U.S. 186 (1986).

ety's historical practice of denouncing homosexual activity and concluded that was sufficient, in effect, to end the Court's inquiry. If he had taken the small final step of saying, "and we agree with Georgia that this prohibited conduct is immoral," then the case would have provided the perfect example of a court exercising the wrong kind of moral supervision over the law.

But Eisgruber has also contributed to the confusion on this issue. His treatment of the *Hardwick* case illustrates the linguistic ambiguity in the use of the term "moral" as applied to these questions. That case, in which the Supreme Court explicitly endorsed the legitimacy of a "moral" basis for the community's prohibition, is the case that Eisgruber singles out as an example of one in which the Court was *insufficiently* attentive to moral issues. He suggests that had Justice White "put his opinion on moral grounds, he would at least have given the public an accurate account of the Court's responsibilities and its approach to them."[34] Eisgruber means, I think, that Justice White should have explicitly discussed the *political judgment* that the Court was implicitly making regarding the appropriateness of a legislature's imposition of this kind of restriction on individual freedom—the Second-Order Question that tacitly underlay the Court's opinion. To call that judgment "moral" at the same time that the Court is defending the state's enactment of "laws representing essentially moral choices,"[35] presents a dizzying cacophony.

Another source of the confusion is Eisgruber's recognition that "[m]any theorists suppose that if people in a democracy divide over questions of value, then the majority's view ought to prevail."[36] The theorists he describes, as I have understood them, have suggested that when part of a community thinks, for example, that homosexuality or abortion is immoral, while another part does not share that moral view, the right result is that those with the most votes should be able to make a determination for all. The Supreme Court has itself taken this view when it pointed out that, by declining to recognize constitutional limits on states' resolutions of divisive moral disagreements, it "permits this debate to continue, as it should in a democratic society."[37] Thus, courts that take this view adopt a very passive role or even give

34. EISGRUBER, *supra* note 2, at 120.

35. *Hardwick*, 478 U.S. at 196.

36. EISGRUBER, *supra* note 2, at 53 (citing ELY, *supra* note 3, at 179, for the proposition that "the choosing of values is a prerogative appropriately left to the majority").

37. Washington v. Glucksberg, 521 U.S. 702, 735 (1997). *See also* Stenberg v. Carhart, 530 U.S. 914, 956 (1999) (Scalia, J., dissenting) ("[t]his Court should return this matter [abortion] to the people").

total deference to the acts of the popularly elected branches of government on certain issues.[38] By doing so, they ensure that these types of divisive moral questions are resolved legislatively, not judicially. Eisgruber's discussion suggests, however, that he might call upon the Court to resolve the moral dispute dividing the people. He says, for example, that "[l]ife tenure enhances the possibility that judges will approach moral issues in a disinterested fashion, and so bring to bear upon those issues the right kinds of reasons—reasons that flow from a genuine effort to distinguish between right and wrong, rather than from self-interest."[39] This could be understood to suggest that Eisgruber would have the Court answer the same question that had divided the people—the First-Order Question regarding the morality of some behavior—based on which side it thinks got the right answer. These are not the questions the courts should be answering.

The question we *do* want the Court to decide, in every such case, is the question of what limits there should be on a government wishing (for moral or other reasons) to restrict the freedom of an individual in a democratic state such as ours—the permissible extent of such restrictions and the reasons governments can offer to support them. This judgment requires the very qualities that Eisgruber celebrates in the judiciary—a familiarity with American history, a sense of the American people and the kind of society we view ourselves as having, with freedom to make the decision according to what is right, in the absence of any fear of particular recrimination or retaliation.

If the issue before the courts were framed this way, I believe the skeptics would have more difficulty claiming that the average person or legislator is in a better position to answer the question thoughtfully than is the Court. Professor Hills reminds, us, for example, that the people tend to feel more passionate about their moral convictions than does the Court.[40] He offers this as a reason to suggest that people are better than judges at deciding moral questions. He is right, I think, to point out that passion is important to principle, and that the passionate pursuit of principle by citizens is one of democracy's proudest traditions. But this passion should be devoted to the First-Order moral convictions—like whether slavery or racial segregation is a morally acceptable state of affairs. Passion can actually be an impediment, however, to resolution of the Second-Order Question—

38. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24–29 (1999).

39. EISGRUBER, *supra* note 2, at 78.

40. *See* Hills, *supra* note 5, at 16–18.

whether the appropriate relationship of government to the individual in a free society can tolerate a practice that the people may feel passionately about in the moral sense. That is a question best resolved *dis*passionately, by courts using their best political judgment about societal expectations of liberty.[41] Once the two questions are carefully separated, it is quite clear that the very fact that the people *are* passionate and committed to their moral beliefs (and thereby in harmony with the demands placed upon them by a First-Order Question) impedes them from being good at the Second-Order Question. The impartiality principle that Professor Eisgruber establishes in the first half of his book demands that these Second-Order Questions be answered based on accessible reasons, not on passion.

Is it morally acceptable to terminate a pregnancy? Is it morally acceptable for a physician to assist a terminally ill person to take her own life? These are moral questions of the most passionate variety. But democracy requires that a further question be answered in every case: Whatever the truth about the morality of abortion, whatever the truth about the morality of assisted suicide, to what extent can the moral views of one fraction of the population be permitted to control the behavior of the rest, given the depth and importance of each of these matters to living a meaningful life in a free society? That question is not one on which passion should rule the day. Rather, that is a question for someone who does tend to have a longer view, deriving, perhaps from a greater sense of history and tradition, and a passing acquaintance with political philosophy involving the relationship between an individual and a state—and, as Eisgruber argues, a representative obligation to the American people. This is a Second-Order inquiry that requires the luxury of independence.

Does this mean that judges, afforded these privileges, will always do a good job at making the political judgments that we ask of them? Will they always be free of bias and passion and self-interest? Of course not. Courts throughout history, including the present, have placed strains upon many a commitment to a vigorous judiciary. But, like the framers, we need to separate the institutional questions from the personal. Just as an incompetent President does not condemn Article II, a judiciary that is not good at being the guardian of principle does not negate the institutional advantages that that body is given in order to

41. *See* John Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1459–61 (1999) (describing Justice Cardozo's view that the detached judge will be more inclined to see law as a system of concepts, rules and principles, and to take seriously the idea that a large part of his job is to understand and render that system coherent).

encourage it in its task. Nor should it weaken our commitment to confiding this important task to the courts.

Eisgruber has given us the reasons to entrust to the judiciary the ultimate question of political judgment I have called the Second-Order Question: What kind of relationship between a government and an individual can be tolerated in a free democracy?[42] At least with regard to individual rights provisions in the Constitution, and even, with slight variation, with regard to other constitutional provisions, this is the question the Supreme Court has to answer most frequently. It must answer that same question again and again in different forms as it addresses each of the many invocations of constitutional protection that the litigants before it intone. It is appropriate that there should be one specialized body particularly suited to answering that question so important to a democracy.

If the right question is posed, however—the Second-Order Question—then the judicial selection process can be used effectively. What the political process of appointment can produce is judges who, while perhaps holding mainstream views on moral issues personally, yet, by reason of judgment, experience, and institutional independence, are able to set aside those personal views long enough to address honestly the only question appropriate for their resolution—whether the Constitution tolerates the state action at issue. There is no reason to think that the person on the street, or nine people picked at random from the Kansas City telephone directory, would be more competent to answer that question of political judgment than a person selected for appointment through the constitutional confirmation process.

Professor Eisgruber has contributed to the consideration of the judiciary's proper task both descriptively and prescriptively. He demonstrates that the assignment of the Second-Order Question to the judiciary need not be something a democracy is ashamed of, but rather is an integral part of a vigorous commitment to democracy. In addition, he instructs the courts in how to do their assigned task—

42. There will be times when the distinction between First- and Second-Order Questions collapses somewhat, most often when the question involves government, rather than private, behavior. For example, the morality of imposing the death penalty may appear to present both levels of question. Yet the courts must always ask the question cast in terms of the assessment of the use of power by the state upon the individual, and the people's views on that political question will be relevant, on Eisgruber's account, to the court's resolution of the matter. *See, e.g.*, Atkins v. Virginia, 122 S. Ct. 2242, 2249 n.21 (June 20, 2002) (using polling data to support majority's conclusion that execution of mentally retarded is contrary to consensus view held by American people). *See also id.* at 2255 (Rehnquist, J., dissenting) (ridiculing majority's use of polling evidence as "judicial fiat").

how to answer their single question—with as great a sensitivity as possible to the society they are designated to represent. This makes explicit that the basis for their judgment should be in the tradition established by Justice Cardozo and then carried on by Justice Harlan. Cardozo advocated a "sensitive inquiry, at once historical and normative, into 'the traditions and conscience of our people.'"[43] Justice Harlan later captured a similar spirit when he interpreted the constitutional inquiry as "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[44] Eisgruber elaborates by making this inquiry even more explicitly an investigation into the conceptions of justice that the American people hold.

The ambiguity that I have identified in the judges' undertaking suggests to me that Eisgruber's aversion to conceptualism and overly technical lawyerly readings of the Constitution may have led him to leave us with an underdeveloped solution to the problem of interpretation. It would be very helpful to hear from Professor Eisgruber more on what he means for the judge to do when approaching moral questions, and the ways in which judges should use their special competence to address such questions. But he may believe that any more specificity is impossible or undesirable—that the best that a sound constitutional theory can do is to free judges from the artificial and destructive constraints imposed by other theories, to go out and use their judgment as best they can. This view of the judge's role would fit into the tradition of practical judgment espoused by Justices Cardozo and Harlan, and would give new importance to the process of selecting judges.

My favorite aspect of this book is that it gives us a new job description to use when we go out looking for people to nominate to the bench. It is high time. At least since Nixon's presidency, the public rhetoric surrounding appointments to the bench has revolved around a variety of terms, phrases, and jargon all designed to suggest that judges have no real place in our democracy: "if we must have them, at least let's not give them anything important to do." Judges have been portrayed as an embarrassment.

Anyone who did want to give the judiciary anything important to do was accused of being undemocratic, elite, downright un-American. It is not surprising, therefore, that those who have been selected for

43. Goldberg, *supra* note 41, at 1472 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

44. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

those posts tended to be those who were best at not claiming to be good at anything. The moment a person could be said to be good at something, there would be fear that she might actually seek to use her talents to do something. And that is undemocratic. So if we have attracted any degree of quality of insight, heart, judgment, or intellect to the bench through this abysmal process, it is pretty much a matter of luck.

Professor Hills points out plausibly that "the confirmation process has become an intellectually barren game of cat-and-mouse, where the nominee blandly refuses to say anything that could spark the sort of popular discussion that Eisgruber celebrates and the hostile Senators try to trap the nominee into saying something substantial and therefore controversial."[45] But that barren wasteland is due, I think, to the very mantra that Hills intones. The debate is barren because the public does not want a Court that makes important political judgments. How would a president justify to the people a rigorous search for the keenest intellect or most impressive judgment to nominate for the bench if the judge, once appointed, is supposed to defer at every turn to the majoritarian processes of government? What would be the point of pressing a candidate with challenging discussions focused on his or her political insight or quality of legal analysis? Somehow it has become publicly acceptable, if not required, to embrace the skeptic's view that judges should only follow the law and not seek to make it.

But if we take Eisgruber's ideas seriously, the polity could begin to have a very different discussion about its judiciary. It would enable us publicly to admit that the Court has an important job, admit that the Court does have a significant role to play in the making of law, when it asks the final question of a law: whether the law is consistent with a tolerable relationship between a government and an individual in a free society. The question we would want to ask a potential judge is how deeply he or she understands the American people's notion of liberty as it prepares to confront new forms of antagonism in changing times. Would we feel comfortable entrusting the most significant political—as opposed to moral—judgments in those hands? Stealth candidates need not apply.

Conclusion

In the end, the real disagreement in constitutional theory divides over whether we have a Constitution to prevent societal change or to

45. Hills, *supra* note 5, at 53.

facilitate it. Eisgruber reminds us that the idea of preventing change compromises our very commitment to democracy. On the affirmative side, he also inspires us to believe that it is possible to facilitate change without the loss of moral principle—we *can* mature without rotting.[46] And the courts have an important role to play in that democratic evolution.

Participation in government is an important part of self-rule. So is electoral control. But together, those two aspects of democracy, government of and by the people, make an incomplete picture of our nation's commitment to popular sovereignty. To achieve the three-sided geometrical figure with the greatest strength and stability, we also need the final element, a sense that all people are protected by the enduring principles that ensure liberty.

For Eisgruber, constitutionalism is a way of opening up the possibilities of a polity to flourish and to seek its most noble ends. It is an enabling, an empowering device for the people, through their governments, to live out their deepest commitments and to give meaning to their sincere conceptions of justice. This affirmative portrayal of a constitution stands in stark contrast to those offered by the vast majority of theorists, who tend to view constitutionalism as a way to shut down, constrain or disable the people. That view inspires theories that artificially formalize and cramp the interpretation of the Constitution, seeking, overall, to rob judges of their most valuable asset, their judgment. But Eisgruber shows us that, understood for what it is, the Constitution can do wonderful things by presenting to the people an account of their own moral judgments, thus enabling them to maintain a government *for* the people.

46. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40–41 (1997) (expressing the view that the adoption of a bill of rights suggests founders' skepticism "that societies always 'mature,' as opposed to rot"), *quoted in* EISGRUBER, *supra* note 2, at 36.